

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,

No. C-10-04879 JCS

Plaintiff,

v.

WELLNESS SUPPORT NETWORK, INC., ET
AL.,

Defendants.

**ORDER DENYING MOTION TO
DISMISS FIRST AMENDED
COMPLAINT FILED BY DEFENDANTS
WELLNESS SUPPORT NETWORK,
INC., ROBERT HELD AND ROBYN
HELD [Docket No. 30]**

I. INTRODUCTION

Plaintiff Federal Trade Commission (“FTC”) brings this action for injunctive relief and other remedies under Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), alleging that Defendants have engaged in false advertising and deceptive practices in connection with their sale of certain dietary supplements, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) & 52. Defendants filed a motion to dismiss the original complaint in this action pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, which the Court denied except as to the claims against Defendant Robyn Held, whose involvement in the alleged conduct was insufficiently pled. *See* Docket No. 24. The Court granted Plaintiff leave to amend its complaint and the FTC filed an amended complaint that is virtually identical to the original complaint except that it includes more specific allegations regarding Ms. Held’s involvement.

Defendants now bring a Motion to Dismiss First Amended Complaint (“Motion”) that does not challenge the sufficiency of the allegations regarding Ms. Held’s involvement but rather, challenges the claims under Rule 12(b)(6) on other grounds that were not raised in Defendants’ previous motion to dismiss. The Court finds that the Motion is suitable for determination without oral argument pursuant to Civ. L. R. 7-1(b) and therefore **vacates the September 16, 2011 motion**

1 **hearing. The Case Management Conference set for the same date shall remain on calendar**
 2 **but will be conducted at 1:30 p.m. rather than at 9:30 a.m., as originally scheduled.** For the
 3 reasons stated below, the Motion is DENIED without prejudice.¹

4 **II. BACKGROUND**

5 **A. The First Amended Complaint²**

6 In the First Amended Complaint, the FTC alleges that Defendant Wellness Support Network,
 7 Inc. (“WSN”), as well as its owners, Robert and Robyn Held, have engaged in false and deceptive
 8 advertising practices in promoting two of WSN’s products, The WSN® Diabetic Pack and The
 9 WSN® Insulin Resistance Pack. First Amended Complaint (“FAC”).³ The FTC asserts two claims
 10 against Defendants, one based on Defendants’ allegedly deceptive claims as to the WSN® Diabetic
 11 Pack, the other aimed at Defendants’ allegedly deceptive claims as to the WSN® Insulin Resistance
 12 Pack. Both claims are asserted under Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and
 13 52.

14 **B. The Motion to Dismiss**

15 In the Motion, Defendants assert that the First Amended Complaint should be dismissed
 16 under Rule 12(b)(6) of the Federal Rules of Civil Procedure because: 1) the FTC’s claims are based
 17 on the standards that apply to “dietary supplements,” whereas Defendants’ products are “medical
 18 foods;” 2) the standard upon which the FTC’s claims are based violates the First Amendment of the
 19 United States Constitution because Defendants’ products are medical foods; 3) the FTC’s claims are
 20 based on standards developed in prior FTC adjudications involving third party dietary supplement
 21

22 ¹The parties have consented to the jurisdiction of a United States magistrate judge pursuant to
 23 28 U.S.C. § 636(c).

24 ²The Court assumes the allegations in the complaint to be true for the purposes of this motion.
 25 *See Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 338 (9th Cir. 1996)(on motion to dismiss under Rule
 26 12(b)(6) of the Federal Rules of Civil Procedure, the court assumes the facts alleged in the complaint
 27 are true).

28 ³Because the Court in its previous order set forth the specific statements that the FTC alleged
 in the original complaint were deceptive and misleading – and because those allegations remain
 unchanged in the First Amended Complaint – the Court does not repeat them here.

manufactures; broad application of these standards to Defendants constitutes an impermissible attempt to circumvent the rulemaking procedures required under the Administrative Procedures Act (“APA”); 4) the FTC’s standard is an unlawful use of a guidance document to the extent that it is based on a policy statement; and 5) the Ninth Circuit’s decision in *FTC v. Pantron I Corp.*, 33 F.3d 1088 (9th Cir. 1994) (“*Pantron I*”), defining “truth” and “substantiation” in connection with deceptive advertising under the FTC Act, does not apply because in that case the product at issue was a drug whereas here, the products are medical foods.

The FTC counters that: 1) Defendants’ argument that the claims fail because their products are not dietary supplements, as alleged by the FTC, but rather medical foods, lacks merit because the FTC Act does not distinguish between dietary supplements and medical foods and in any event, the argument turns on a factual question that may not be determined on a Rule 12(b)(6) motion; 2) there is no First Amendment right to engage in deceptive advertising and the FTC’s enforcement of the FTC Act does not infringe on Defendants’ commercial speech rights; 3) the FTC is not attempting to evade the rulemaking procedures set forth in the APA because it is not attempting to make a new rule but rather, is simply enforcing established standards relating to advertising of products that includes health claims, as set forth in *Pantron I*; furthermore, administrative agencies are free to announce new principles of law during adjudication, with only narrow exceptions that do not apply here; and 4) in citing a policy document in its brief filed in opposition to Defendants’ previous motion to dismiss, the FTC did not suggest that that document had the force of law and the FTC does not rely on that document in support of its claims, which are based on the FTC Act.

III. ANALYSIS

A. Legal Standard

1. Rule 12(b)(6)

A complaint may be dismissed for failure to state a claim for which relief can be granted under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 12(b)(6). “The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the complaint.” *N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir. 1983). Generally, a plaintiff’s burden at the

pleading stage is relatively light. Rule 8(a) of the Federal Rules of Civil Procedure states that “[a] pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a).

In ruling on a motion to dismiss under Rule 12, the court analyzes the complaint and takes “all allegations of material fact as true and construe(s) them in the lights most favorable to the non-moving party.” *Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Dismissal may be based on a lack of a cognizable legal theory or on the absence of facts that would support a valid theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). A complaint must “contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007) (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)). The factual allegations must be definite enough to “raise a right to relief above the speculative level.” *Id.* at 555. However, a complaint does not need detailed factual allegations to survive dismissal. *Id.* Rather, a complaint need only include enough facts to state a claim that is “plausible on its face.” *Id.* at 570. That is, the pleadings must contain factual allegations “plausibly suggesting (not merely consistent with)” a right to relief. *Id.* at 1557 (noting that this requirement is consistent with Fed. R. Civ. P. 8(a)(2), which requires that the pleadings demonstrate that “the pleader is entitled to relief”).

B. Whether Defendants’ Motion is Timely

At the outset, the Court notes that none of the arguments advanced by Defendants in the Motion is aimed at the amendments to the complaint made by the FTC in response to the Court’s ruling on Defendants’ first motion to dismiss. Rather, all of Defendants’ arguments are addressed to allegations and claims that were included in the original complaint and therefore could have been raised in Defendants’ previous motion to dismiss. Therefore, the Court considers whether Defendants’ motion is timely.

Rule 12(g) of the Federal Rules of Civil Procedure provides as follows:

(2) **Limitation on Further Motions.** Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

1 Fed. R. Civ. P. 12(g). Rule 12(h)(2), in turn, allows a party to raise a defense of failure to state a
2 claim: “(A) in any pleading allowed or ordered under Rule 7(a); (B) by a motion under Rule 12(c);
3 or (C) at trial.” Fed. R. Civ. P. 12(h)(2). While Rule “12(g)(2) technically prohibits successive
4 motions to dismiss that raise arguments that could have been made in a prior motion . . . courts faced
5 with a successive motion often exercise their discretion to consider the new arguments in the
6 interests of judicial economy.” *Amaretto Ranch Breedables, LLC v. Ozimals, Inc.*, 2011 WL
7 2690437, at *2, n. 1 (N.D. Cal., July 8, 2011) (citing *Nat. City Bank, N.A. v. Prime Lending, Inc.*,
8 2010 WL 2854247, at *2 (E.D.Wash. July 19, 2010)). In *National City Bank, N.A. v. Prime*
9 *Lending, Inc.*, the court reasoned as follows:

10 Judicial economy favors ignoring the motions' technical deficiencies. Rule 12(g) merely
11 prohibits them from raising it before filing an answer because they did not raise it in their
12 initial response under Rule 12(b). Plaintiffs do not dispute that Defendants would simply be
13 able to renew their motion as a Rule 12(c) motion for judgment on the pleadings after filing
14 an answer. The Court declines to pass on this opportunity to narrow the issues because
15 Defendants are entitled to raise these defenses even if they already filed a motion to dismiss.
16 Nor do the motions result in prejudice or surprise. The Court finds good cause to consider
17 them now.

18 *Nat. City Bank, N.A. v. Prime Lending, Inc.*, 2010 WL 2854247, at *2 (E.D.Wash. July 19, 2010).

19 Here, in contrast to *National City Bank v. Prime Lending, Inc.*, judicial economy does not
20 favor an exercise of discretion to consider Defendants’ Motion because Defendants’ arguments turn
21 on the nature of the products they are advertising, which is a factual question. In particular,
22 Defendants argue that the claims should be dismissed because their products are not dietary
23 supplements, as the FTC alleges in the First Amended Complaint but instead, medical foods, which
24 they assert are subject to a lower standard under the FTC Act. Defendants further contend that
25 because their products are medical foods the FTC’s claims violate the First Amendment, constitute
26 impermissible rulemaking under the APA and render distinguishable the leading Ninth Circuit case
27 addressing deceptive advertising under the FTC Act, *Pantron I*. These are fact questions that are
28 properly addressed at the summary judgment stage of the case and *not* on the pleadings. Therefore,
the Court declines to exercise its discretion to consider the Motion.

IV. CONCLUSION

The Motion is DENIED on the basis that it is untimely under Rule 12(g)(2).

IT IS SO ORDERED.

Dated: September 12, 2011



JOSEPH C. SPERO
United States Magistrate Judge